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IN THE

Supreme Court of the United States

October Term, 1949

No. ~~107~~ /

STANDARD OIL COMPANY,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF ON BEHALF OF RETAIL GASOLINE DEALERS ASSOCIATION OF MICHIGAN, INC., MICHIGAN PETROLEUM ASSOCIATION, INC., AND NATIONAL CONGRESS OF PETROLEUM RETAILERS, INC., *AMICI CURIAE.*

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Interest of Amici Curiae.

Retail Gasoline Dealers Association of Michigan, Inc. is a Michigan non-profit membership corporation serving the interests of the retail gasoline dealers of that State. The Association has more than 2,000 members in the State of Michigan, and more than 1,450 members in the Detroit Metropolitan Area. Its Detroit membership is fairly representative of all the retail gasoline dealers of that area.

The retail gasoline dealers of Detroit have a direct and vital interest in the outcome of this proceeding. They are the principal beneficiaries of the order of the Federal Trade Commission which is the subject of the proceeding, and are the persons who would be most directly affected if the decree of the United States Court of Appeals affirming that order should be set aside.

Michigan Petroleum Association is also a non-profit membership corporation, representing the independent jobbers of Michigan. The jobbers of Michigan are engaged in the business of petroleum marketing in the specific geographical areas concerned in this case, and are directly interested in the decree herein due to the protection which it affords to them and to their customers.

National Congress of Petroleum Retailers, Inc., incorporated under the laws of Michigan as a non-profit membership corporation, is a trade congress of affiliated retail gasoline dealer associations throughout the nation, formed for the purpose of fostering and promoting the interests and welfare of the 275,000 gasoline retailers in the United States. It is the only trade association of retail dealers in petroleum products having a nation-wide representation. Its membership is comprised of 38 state and local associations of petroleum retailers (including the Michigan Association) located in twenty-three states and the District of Columbia.*

The interest of the National Congress of Petroleum Retailers in the affirmance of the decree of the court below is identical with that of the Michigan retailers' association. The record herein indicates that the practices prohibited by said decree are engaged in by petitioner and by other oil companies in areas in various parts of the United States.

The complaint herein charged, and the Commission found, that petitioner has discriminated in price in the sale of its gasoline in the Detroit metropolitan area by selling such gasoline to four dealers, classified by petitioner as jobbers but who resell in whole or in part at retail, at prices

* A list of the affiliated gasoline retailer associations comprising the membership of the National Congress of Petroleum Retailers is

substantially lower than the price which petitioner charges for the same gasoline to the 350 to 400 other retail dealers whom it supplies in that area. The Commission found, and it is not now disputed, that these price discriminations have had and may have the effect of injuring, destroying and preventing competition between the four favored dealers and the other retailers in Detroit who are forced to purchase their gasoline from petitioner at higher prices. The Commission's order, and the decree of the Court of Appeals here for review, prohibit those discriminations in price. Said order and decree have for their direct purpose and primary effect the protection of the retail gasoline dealers of Detroit and other areas served by petitioner from injurious and ruinous competition engendered by petitioner's said discriminations. Presumably the law of this case will be observed and followed by other oil companies in Detroit and elsewhere. The retail gasoline dealers of Detroit and of the nation, therefore, have a direct and important interest in the said order and decree.

Preliminary Statement of Case.

The situation presented by this case is that of a large gasoline retailer, and three wholesalers who resold in part at retail, who were able to demand and obtain, because of the quantities in which they purchased, a substantially lower price for petitioner's gasoline than the price charged for the same gasoline to more than 350 other retailers reselling it in competition with the four favored dealers under the same brands. While the favored dealers were classified by petitioner as "jobbers" and bought in tank car quantities, they were in fact retailers and the Commission found that the lower price to them was not justified by any cost savings to petitioner in serving them. The Commission

retailers a substantial competitive advantage over the retailers paying the higher price, which has resulted and may result in serious injury to competition.

One of the wholesalers not only resold at retail, but also passed along a part of its price advantage to certain of its customers, thereby giving them as well a competitive advantage over the retailers buying from petitioner direct.

The Commission concluded that by these discriminations petitioner was violating *Section 2(a)* of the Clayton Act. The sufficiency of the Commission's findings to support that conclusion is not in dispute, except as to interstate commerce. Petitioner's principal contention is that Section 2(a) is not a complete section defining a prohibited offense, but is modified by the proviso of Section 2(b); that a *discrimination* in price declared unlawful by Section 2(a) is not unlawful if the seller can show only that the *lower* of his two prices was made in good faith to meet a price offered by one of his competitors; and that such a showing is a complete defense to a charge of violation of Section 2(a) regardless of the amount of the discrimination and regardless of its effect on competition between the seller's customers.

The Commission held that the effect to be given proof of "meeting competition" is not a matter of law but a matter of evidence, and that such proof was not available to petitioner as a defense *on the facts of this case* because it did not and could not rebut or overcome the Commission's evidence of injury to competition resulting from the discrimination. The Commission entered its cease and desist order accordingly, which order has been unanimously affirmed (with slight modification) by the United States Court of Appeals for the Seventh Circuit.

The Factual Background of Petitioner's Discriminations in Price in Detroit.

The Impact of Price Discrimination on Retail Gasoline Competition.

There is no business in which competition is more sensitive to, or more immediately affected by, price discrimination than the retail gasoline business. There are several reasons why this is true.

First, the gasoline trade is on wheels. In a large metropolitan area like the Detroit area the average driver of an automobile can without inconvenience buy gasoline at any one of hundreds of service stations throughout a territory of many square miles through which he drives regularly. There are 3700 or 3800 retail gasoline service stations in metropolitan Detroit (R. 298), of which some 450 stations (including those supplied by wholesalers) dispense petitioner's gasoline from Red Crown pumps (R. 5057-60). A commuter who usually buys his gasoline at a service station near his suburban home will pass dozens of service stations every day driving to and from his work, and can and will transfer his business to a station many miles from his home when he sees a price cutting sign advertising a cut of even a fraction of a cent a gallon. For this reason, competition with a retail gasoline station is not limited to nearby stations, and a competitive advantage obtained by one station, particularly where located on a main artery of traffic, will be felt by other stations many miles away.

A second reason for the sensitivity of competition between retail gasoline dealers is that the volume of retail gasoline business is practically constant, except for seasonal variations, depending almost entirely upon the num-

ber of automobiles in use in the area from year to year. There is no such thing as "new" gasoline business to be obtained by advertising, salesmanship or price cutting. If a dealer increases his business by any of these means he must do so by taking that business away from other dealers (R. 153). This means that whenever a gasoline retailer obtains an advantage in price which enables him to increase his volume, the increase will be at the expense of other dealers and will be immediately felt.

When one retail dealer obtains a price advantage in purchasing gasoline, price cutting to attract more volume is the almost inevitable result (R. 320, 1047). Price is the most potent factor in gaining and regaining customers at a retail service station. The vast majority of gasoline purchasers in Detroit are wage earners. They are very price-conscious, and price is the predominating factor that brings their trade in or keeps it away (R. 325, 338). Since the branded gasolines of the major oil companies are of substantially the same quality in the public mind (R. 325), a lower price at one service station selling a major brand than at another is a very important factor in attracting business.

Still another reason why a price advantage given certain dealers is not only quickly felt in the retail gasoline business but has a serious effect upon the ability of other retailers to compete, is found in the fact that in a highly competitive area like Detroit the dealer's margin between the price he pays and the price at which he sells is very narrow. From November, 1939 to the time this case was tried the margin in Detroit between the posted tank wagon price of the major oil companies and the prevailing retail selling price was only 3.3 cents a gallon (Comm. Ex. 3, R.

4715). A survey of retail gasoline marketing costs in Detroit made in 1938 by Herbert F. Taggart, Professor of Accounting at the University of Michigan, showed that the average cost of selling gasoline at retail service stations was 4.8 cents a gallon, and that the average cost of sale by the most efficient 25% of the stations was 3.5 cents a gallon (R. 674, 4748, Comm. Ex. 76). These statistics show that, allowing a reasonable salary for the service station operator as a cost of sale, most service stations in Detroit had to sell gasoline at or below cost and rely on the sale of other products for profit, if any. This explains why most retail dealers paying the tank wagon price cannot profitably cut their selling price to obtain additional volume and why their ability to compete at all is seriously endangered when part of their customers are diverted to the stations of other dealers who are enabled to cut their price by reason of being permitted to buy in tank car quantities at a differential greater than their cost of distribution (R. 323-4).

Petitioner's tank car price to the four favored dealers for its Red Crown gasoline which they resold at retail, was 1½ cents a gallon below the tank wagon price charged other retailers. This differential gave the tank car buyers a net price advantage over their competitors of something more than a cent a gallon. (Critin-Kolb was able to resell to one customer at a cent below tank wagon price (R. 1878-9); and Ned's Auto Supply Company abandoned employing contract haulers to transport its gasoline from storage tank to service station at .45 cents a gallon in favor of using its own trucks, which presumably cost less (R. 1825). This meant that the four tank car buyers had a retail operating margin about 30 per cent greater than the margin available to other retailers at prevailing prices, which, of course, constituted an enormous competitive advantage.

Petitioner Refuses to Sell to Its Retailer Customers, Other Than Ned's, in Tank Car Quantities at Tank Car Prices.

Petitioner's business in Detroit is established and has been built up as the business of selling gasoline direct to retail dealers by tank truck (tank wagon) delivery to the service station. Only about 18 percent of the gasoline sold by petitioner in the Detroit area in 1940 was sold to jobbers, including that resold at wholesale (Res. Ex. 58, R. 4789).

Prior to 1936 petitioner operated its own retail service stations, selling direct to the public. It had acquired, and has continued to acquire, many valuable and strategically located service station properties. Petitioner now owns about 200 service station properties in Detroit, and nearly 80 percent of the gasoline sold by it there to operators of retail stations is sold to the lessees of these properties (Comm. Ex. 119, R. 4783). Gasoline service stations are property not readily converted to other use since they are constructed with underground storage tanks, driveways, pumps and fixtures suitable only for dispensing gasoline.

Petitioner maintains six bulk plants in the City of Detroit for the purpose of supplying its "tank wagon" retailer customers (R. 108). Petitioner owns and operates a fleet of tank trucks in which the gasoline is delivered from the bulk plants directly into the service stations tanks of those customers. Petitioner also owns an office building in Detroit and employs over 350 persons in the operation of its business of distributing and selling to retailers (R. 184).

The Commission has found that petitioner's tank car differential to jobbers is not justified by differences in cost of sale and delivery. It follows that petitioner makes a greater profit per gallon on tank wagon sales to retailers than on tank car sales to jobbers. The testimony on the issue of cost justification indicates that petitioner probably

realizes a net profit of from three-quarters of a cent to a cent more per gallon on tank wagon sales than on tank car sales. Tank car sales to jobbers are made on credit and a cash discount of 1% for payment within ten days is allowed. Gasoline delivered by tank truck to service stations is sold for cash, and no discount is allowed (R. 159).

Petitioner thus has an enormous investment in its business of selling gasoline by tank wagon delivery to retail service stations as above described. Any great increase in sales of its branded gasoline to jobbers would result in reducing the volume of sales to its own tank wagon buyers upon which its investment and profits depend. In this situation it is to be expected that petitioner would adopt a sales policy preventing its tank wagon customers, so far as possible, from either buying as jobbers or buying from jobbers. This record shows that that is petitioner's policy, and that the policy is enforced.

In a number of instances retail service station operators have applied to petitioner for permission to buy in tank car quantities at tank car prices, but such requests have been denied (R. 145, 552-558, 2088-9). Some service stations in Detroit have sufficient storage capacity to receive delivery of gasoline in 8,000 to 10,000 gallon quantities (R. 395). There is no reason why transport truck (tank car) deliveries could not be made to their tanks (R. 114). Bulk storage and hauling facilities could be secured by any retail dealer or dealers if permitted to purchase on a tank car basis. There are a number of transportation companies in Detroit who make a business of hauling gasoline for hire (R. 395, 984).

It is also contrary to petitioner's policy to permit a group of dealers to pool their requirements and purchase in tank car quantities by using joint storage facilities. Citrin-

Kolb Oil Company when it first started to buy from petitioner as a jobber had joint storage facilities with Carnick Oil Company, another jobber, and Citrin-Kolb was informed by petitioner that unless they stopped that practice immediately and obtained their own bulk plant Standard would refuse to sell to them at tank car prices because it did not wish to set a precedent of allowing two or more dealers to get together and buy at the jobber margin by obtaining bulk storage (R. 1256).

Since 1936, only one dealer in the Detroit area reselling petitioner's gasoline wholly or principally at retail has been permitted to buy as a jobber. That dealer is Neds Auto Supply Company, one of the four jobbers named in the Commission's complaint. In 1936 Neds had four large retail stations, and its gasoline volume was 2,401,000 gallons. On September 1, 1936 petitioner began to sell to Neds at one-half cent a gallon below the posted wagon price, continuing to make deliveries into Neds' tanks by tank truck. In 1937 Neds was openly advertising cut prices and its volume increased to 4,240,000 gallons (Res. Ex. 54).

In March, 1938, Ned's prevailed upon petitioner to classify it as a jobber and permit it to purchase petitioner's gasoline in tank car quantities at tank car prices. In that year a general business depression existed causing the volume of gasoline sold in Detroit to fall 10% below 1937 (R. 1904). Ned's gasoline volume, on the other hand, increased to 4,880,000 gallons. In July and October of that year Ned opened two new super-service stations.

Petitioner states (brief, p. 4) that the four dealers to whom it sold as jobbers were classified as jobbers "under industry practice" because they owned bulk storage tanks and delivery trucks, purchased more than a million gallons a year, and had good credit. If that is true, then it simply

means that it was an industry practice to grant a quantity price to purchasers taking certain annual quantities by carload delivery, which discount was not available to their smaller competitors. Actually, however, these requirements or qualifications for buying as a jobber were petitioner's own arbitrary requirements for the Detroit area, made so high, of course, that no retailer other than Ned's could meet them (R. 119). Of nineteen jobbers in Oklahoma supplied by petitioner in 1939, only one bought over a million gallons, and eight bought less than 100,000 gallons during the year (R. 2575-6).

It thus appears that petitioner has discriminated in price since 1936 in favor of one large chain retailer and three wholesaler-retailers in Detroit while refusing to allow its other retailer customers to purchase in the same quantities or at the same price. The injurious effect of this discrimination in the competitive situation above described, is readily understandable and is graphically portrayed in this record.

Petitioner's Retailer Customers Cannot Purchase Their Gasoline From Wholesalers.

Not only are petitioner's retailer customers in Detroit (other than the four jobbers) unable to buy their gasoline at the jobber price; they are also in practice prevented by lessee relationship with petitioner or by contract from buying petitioner's gasoline from any other source.

About 60 percent in number of the retail dealers purchasing gasoline from petitioner in Detroit are petitioner's lessees. Petitioner leases its service station properties by short term leases on the understanding that the operators will purchase their gasoline from petitioner by tank wagon delivery at tank wagon prices (R. 2123-4). The leases do

not expressly require the lessees to buy their requirements of gasoline from petitioner, but none of its lessee stations have ever been serviced with gasoline by any other company (R. 2092). Most leases are for one year periods (R. 107; Comm. Ex. 1, R. 4702).

Service station operators selling petitioner's branded gasoline, but who are not petitioner's lessees, are required to enter into contracts with petitioner (Comm. Ex. 2, R. 4713) containing a clause requiring the dealer to buy from petitioner all of his requirements of petitioner's gasoline at tank wagon prices, payment in cash at time of delivery. Thus about 40 percent of petitioner's retailer customers are prevented by contract from purchasing petitioner's gasoline from any other source.

All business done by petitioner with tank wagon customers in Detroit since 1936 has been done under one of these leases or contracts (R. 210). The result is, of course, that petitioner's tank wagon customers are not at liberty to obtain their supply of gasoline from wholesalers dealing in petitioner's brands, even if the wholesaler should offer them a price below petitioner's tank wagon price.

The retail dealers purchasing at tank wagon prices from petitioner are tied to petitioner not only by leases and contracts, but by petitioner's ownership of the tanks, pumps and tools used in service station operations and its control of the identification advertising used at the stations selling its gasoline. "Identification advertising" means advertising material furnished by petitioner to service stations to identify its products, including the Red Crown globes on the gasoline pumps, "Standard Service" signs, road maps and circulars. Such advertising is supplied by petitioner to all retail service stations selling its regular brands. The globes and signs remain the property of petitioner and can be re-

moved by it from the service station at any time. They can be obtained from no other source, and without such identification the dealer would lose business (R. 157-8, 2107-8).

No True Competition Exists Between Petitioner and Its Wholesaler Customers.

In the above situation it is obvious that there can be no real competition in the Detroit area between the three wholesalers selling petitioner's gasoline and their supplier. It would be most naive to suppose that petitioner would allow its wholesalers to compete for and take away from petitioner the business of the retailer customers from whom its revenue is principally derived. Any doubt on that point was dispelled by Mr. Jacob Citrin, partner in Citrin-Kolb Oil Company, petitioner's largest wholesaler, who testified that his company has never sold to a single customer who was formerly a direct customer of petitioner (R. 1316).

The jobbers supplied by petitioner, in their wholesale as well as in their retail operations, are dependent upon petitioner's good-will and therefore necessarily subject to its control. Petitioner has no contracts with its jobbers and it may refuse to sell to any one of them at any time. Each of the wholesalers supplies from 15 to 60 service stations and buys regularly from petitioner. Each of them sells only petitioner's gasoline and has built up its business upon the public acceptance of petitioner's brands. The record shows clearly that they were accepted by petitioner as tank car customers upon the understanding that they would deal only in petitioner's gasoline as long as they continued to purchase from petitioner (R. 2187-8). Petitioner installs its globes and signs at the service stations supplied by its wholesalers, identifying the petroleum products sold at those stations as petitioner's products (R. 2914). Petitioner does not sell in tank car quantities, for

resale under its brand names, to occasional buyers or to buyers who also deal in other brands (R. 2086-7).

The above facts present a situation which on its face seems very anomalous. The success of petitioner's business in Detroit depends upon the volume of gasoline sold by the retail dealers whom petitioner supplies directly at tank wagon prices. To assure that volume, petitioner maintains an enormous investment in service station properties at good locations throughout the City, and in bulk plants and trucks. It refuses to permit the rank and file of its retailer customers to purchase in tank car quantities at tank car prices, yet petitioner sells and is here insisting that it should be permitted to sell to one large retailer and to three wholesalers who have resold in part at retail, at discriminatory tank car prices which may be used and have been used to take away gallonage from the very retail dealers whose sales are the life blood of petitioner's business and the majority of whom are its lessees.

The answer to this anomaly is found in the fact that petitioner can and does control its jobbers. Concededly petitioner does not want to lose their business, but it is equally certain that it could not afford to grant them a differential of 1½ cents a gallon if they were free to use that differential without restriction to undersell petitioner at wholesale and its retailer customers at retail and thereby take over a substantial part of petitioner's business and impair its investment.

This record indicates that it results to the advantage of petitioner and other major oil companies to have a limited number of retail operators in an area like Detroit who, by being given a lower price, are enabled to cut retail prices from time to time and thereby force other retailers in the area to reduce their prices in an attempt to meet competition, *provided the strings can always be pulled and open*

price cutting stopped when the competitive strain reaches a point where it might produce price competition among the major oil companies. Let us look at the facts.

Prior to the Spring of 1938 the retail dealers' margin in Detroit (difference between tank wagon price and prevailing service station price) was from 4 cents to 4.5 cents a gallon (Comm. Ex. 3; R. 4715). In September, 1936 petitioner began to sell to Ned's Auto Supply Company by tank wagon delivery at ½ cent a gallon below its posted tank wagon price. It is significant that petitioner commenced this discrimination in favor of Ned's at the same time that it discontinued its prior practice of selling direct to the public through its own service stations. Petitioner did not lower its price to Ned's while Ned's was competing with petitioner's own retail stations. In the Fall of 1936 and early in 1937 Ned's and three retailers selling other major brands began posting signs advertising prices below the then prevailing retail price (R. 389-90). This price cutting spread and increased progressively in Detroit during 1937 and 1938. In March, 1938 petitioner began to sell to Ned's at tank car prices. Several witnesses testified that during this period Ned's was advertising discounts of 2 cents a gallon on Red Crown gasoline; that this price cutting spread and became very prevalent in the Detroit market in 1938 and most of the dealers lost volume to such an extent that they were forced to cut their prices to meet competition; that after they cut their prices they regained some of their volume but not their profits.

In the Spring of 1939 prices were stabilized for a few months until another price war broke out in the Fall of that year. The Sun Oil Company, which does not sell to jobbers in Detroit, then reduced its tank wagon price to its Detroit dealers to enable them to meet competition (R. 328-9). This, of course, meant price competition with petitioner from a major competitor, and was quite a different

matter. Petitioner had to reduce its tank wagon price to meet Sun's price. As was to have been expected the retail price cutting which produced this situation was cleaned up very quickly and in the latter part of November, 1939 the tank wagon price was restored to its former level and the retail dealers' margin became established at 3.3 cents a gallon with very little advertised price cutting going on from that time until this case was tried (Comm. Ex. 3; R. 436, 442-8). During 1940 the Federal Trade Commission was investigating petitioner's price discriminations in Detroit, and the complaint in this case was served on December 1st of that year.*

* The above situation is graphically portrayed by the following table, showing petitioner's posted tank wagon price, its jobber tank car price, the prevailing retail service station price, and Ned's posted price, for Red Crown gasoline, on each of various dates from 1937 to 1940, inclusive. This table is compiled from Commission's Exhibits 3 and 22 (R. 4715, 4727) and testimony at R. 234-5. Prices shown are cents per gallon exclusive of all taxes.

	Dealer Tank Wagon Price	Jobber Tank Car Price	Prevailing Retail Serv. Sta. Price	Ned's Posted Price
February 1, 1937	9.6¢	8.1¢	13.6¢	11.6¢
August, 1937	9.9	8.4	14.1	12.1
January, 1938	9.6	8.1	14.1	12.1
April, 1938	9.8	8.3	14.3	12.1
June 1, 1938	9.8	8.3	13.8	12.3
July 1, 1938	9.8	8.3	12.3	12.3
August, 1938	8.8	7.3	12.3	10.9
October, 1938	8.8	7.3	12.1	10.6
November 29, 1938	8.8	7.3	12.1	9.9
January, 1939	7.6	6.35	10.0	9.9
March, 1939	7.6	6.35	10.7	9.9
May, 1939	7.6	6.1	10.7	9.9
July, 1939	8.1	6.6	11.4	11.4
November 1, 1939	7.4	6.15	9.3	9.1
November 15, 1939	6.4	5.4	9.3	8.1
December, 1939	8.1	6.6	11.4	11.3
July, 1940	8.1	6.6	11.4	11.3

The record shows that when Ned's was not openly posting cut prices it gave undercover discounts, redeemable coupons and premiums (R. 245-256).

The net effect of this period of cut price competition (which many witnesses testified was started by Ned's) was a reduction of the dealers' operating margin by about 1 cent a gallon. The resulting margin of 3.3 cents a gallon was close to the lower limit of the cost of the most efficient retailer of selling gasoline at retail, as established by the Taggart Survey (Comm. Ex. 76; R. 674, 4748). The price paid by the public is the sum of the tank wagon price plus the dealer's margin. A lowering of the dealer's margin increases the percentage of the price paid by the public which goes into the till of the major oil company. After such a margin reduction the tank wagon price can be raised without pushing the retail price above what the public was accustomed to paying previously. Unfair price competition between retailers is stimulated by giving an unearned advantage to a few, while tank wagon price competition between major oil companies remains practically non-existent (R. 126, 129).

Petitioner places much emphasis in its statement of facts on competition by Michigan refiners and other "off brand" (non-major) suppliers. The record shows that 87 percent of the total volume of gasoline sold in the Detroit area is sold by major oil companies under their own brands (R. 335). The volume of the non-major group (which includes all the Michigan refiners) combined with third-grade major brand gasoline (such as Stanolind) is only 12 to 13 percent of the total (R. 328). While the non-major gasoline regularly sells at a lower price, the number of stations marketing such gasoline is never sufficient to affect the result of surveys periodically made to determine the prevailing retail price (R. 2027).

One of petitioner's witnesses testified that throughout its entire territory petitioner has very few jobber customers (R. 3230). It is submitted that petitioner's practice

of discriminating in price in favor of a few jobbers here and there who are in fact retailers, to the direct injury of the rank and file of petitioner's retailer customers who cannot buy as jobbers or from jobbers, should be judged, as should also the propriety of the Commission's order in this case, in the light of the above facts. No more clear and flagrant violation of Section 2(a) of the Clayton Act could exist in any case.

Petitioner does not attempt to deny its discriminations in price or the effects above described. It remains to consider (1) whether such a violation of Section 2(a) may be justified under the proviso of Section 2(b) by proof that competitors of the seller were offering to sell to the favored jobbers at equally low prices, and (2) whether there is any merit to petitioner's objections to the terms of Paragraph 6 of the Commission's order.

The Contested Issues & Contentions of the Parties.

Petitioner challenges the Commission's order and the decree affirming it in three respects, each presenting a question of law for the decision of this Court upon the Commission's undisputed findings of fact.

1. Petitioner construes the proviso of Section 2(b) as meaning that a *discrimination* in price declared unlawful by Section 2(a) of the Clayton Act may be completely justified by proof that the seller's *lower* price was made in good faith to meet the equally low price of one of its competitors. The contention is that if a seller encounters competition in selling to one customer, and meets that competition, he is free to charge as high a price as he chooses to his other customers, even though the discrimination results in substantial competitive injury to the customers paying the higher price.

Petitioner asks this Court to hold that if it has justified its *lower* price as made in good faith to meet competition, it does not need to justify its *discrimination* in price, on that ground or any other ground. It makes no pretense of having shown that its higher price, or the *difference* in its prices, was necessary to enable it to meet competition.

The Commission, on the other hand, asserts that where all the elements of violation of Section 2(a), including injury to competition, are affirmatively proved, the proviso of Section 2(b) does not provide an absolute justification for the violation of Section 2(a) so established; that Section 2(a) is a complete section setting forth all available affirmative defenses; and that the 2(b) proviso makes meeting competition a defense only to the extent that such proof may be *effective as a matter of evidence* to rebut or controvert the Commission's evidence of violation of Section 2(a). The Commission found that since the record *in this case* affirmatively shows that petitioner's discrimination in price may result and has resulted in injuring, destroying and preventing competition with its favored retailer customers, "the defense of meeting an equally low price of a competitor as provided by subsection (b) of Section 2 of the Clayton Act is not available to the respondent on the basis of the present record" (Findings, Paragraph Thirteen, R. 5182).

Petitioner also claims that the Commission's construction of the 2(b) proviso is so unreasonable and indefinite as to raise a question of constitutionality. The Commission denies that a substantial constitutional question is presented.

2. Petitioner objects to the *terms* of Paragraph 6 of the order, as modified by the Court of Appeals. It does not dispute that the differential knowingly received by Citrin-Kolb, one of the wholesalers, resulted in injury to compe-

tition with certain of Citrin-Kolb's customers and violated Section 2(a). The Commission, however, did not unqualifiedly prohibit this differential, but limited the prohibition to cases where a wholesaler actually engages in the practice of passing on a part of his wholesale differential to retailer customers competing with petitioner's direct retailer customers. The Court of Appeals qualified this prohibition still further by restricting it to cases where petitioner knows or has reason to know that the differential is being so used.

Petitioner complains that Paragraph 6 would prevent it from selling to wholesalers and retailers in the same sales area except by "the establishment of resale price programs." The Commission takes the position that the effect of the discrimination is the same whether the wholesaler resells at retail himself or passes along his price advantage to his customers, that Section 2(a) is violated in either case, and that without Paragraph 6 the order would be ineffective.

3. Petitioner contends that its interstate commerce in its gasoline transported into Michigan for sale to its Detroit customers comes to an end when the gasoline reaches its marine terminal at River Rouge, and that its sales of such gasoline to Michigan dealers are not in the course of interstate commerce. This issue is fully presented in the briefs filed by petitioner and by the Commission, and will not be discussed in this brief.

Summary of Argument.

1. The legislative history of the Robinson-Patman Act shows clearly that Congress deliberately discarded the old defense of "meeting competition" as an absolute justification for injurious price discrimination. The main purpose of that Act was to prevent chain stores and other large

buyers from using their mass buying power to demand and obtain preferential price treatment not available to their smaller competitors. The meeting competition proviso of old Section 2 was found to be one of the principal obstacles to enforcement in this respect. This case presents a typical example of a large chain retailer, and certain wholesalers who resold in part at retail, demanding and obtaining a preferential price solely because of their large purchasing power, which price was denied or was unavailable to their competitors. The case is the same as where several suppliers of a commodity offer an unearned quantity discount available only to large buyers, or where it is the practice for a number of suppliers to classify chain retailers distributing to their own stores as wholesalers and grant them the wholesale price, or where sellers discriminate between purchasers at different points by the use of fictitious basing points because it is industry practice for competitors do the same. Petitioner sold to Ned's, a chain retailer, at the "going" jobber price and to its smaller retailer customers at the "going" tank wagon price. Petitioner's construction of the proviso of Section 2(b) would nullify the Robinson-Patman Act by enabling large retailers to obtain a competitive advantage over their competitors merely by demanding and obtaining equally low competitive price offers from two or more suppliers.

2. If petitioner's construction of the 2(b) proviso is correct, then the Robinson-Patman Act did not strengthen, but weakened, the Clayton Act. Even the old meeting competition proviso required a seller to show that his *discrimination* in price, not merely his lower price, was made in good faith to meet competition. Petitioner contends that under the Robinson-Patman Act it is enough to justify a discrimination in price between competing customers for the seller to show that his *lower* price was made to meet a

competitor's price, and that it is no longer necessary to show that his higher price, or the difference in his prices, was made in good faith to meet competition. Congress could not have intended to so weaken the Clayton Act. Unlawful discrimination by a competitor does not justify retaliation. On the other hand, if the seller's competitor is not discriminating, but is merely underselling him, then his remedy is to meet that price competition without unlawful discrimination. This decree will protect retailers purchasing from petitioner and from its jobbers alike from the effects of unfair discrimination in the sale of petitioner's branded gasoline, and presumably will be complied with by other major brand companies. Gasoline sold under non-major brands is a minor competitive factor.

3. By its history and express language Section 2(b) applies only to Federal Trade Commission proceedings. It was inserted in the Act as a "precautionary provision" to assure that court rules of evidence and burden of proof would be observed in Commission hearings. "Meeting competition", therefore, is not a defense in triple damage and injunction suits where the 2(b) proviso has no application. Congress could not have intended to provide different defenses and rules of proof in Commission proceedings than in court actions. The only possible answer is that Congress intended that evidence of meeting competition should have exactly the same effect as rebuttal evidence in Commission hearings that it has in court. In cases where such evidence is responsive and overcomes or controverts the Commission's or plaintiff's evidence of injury to competition it may establish a defense. Where, as in the present case, it is not responsive but is wholly consistent with the proof of injury to competing customers resulting from the discrimination, it does not succeed as rebuttal and is no defense. That was in substance the rationale of the decision below.

4. No substantial constitutional question is presented. The decree herein does not prevent petitioner from meeting a competitor's price. The issue is whether meeting a competitor's price to one customer (which may always be done) justifies a higher and discriminatory price to other customers. Sections 2(a) and 2(b) would be valid if all provisos were deleted; indefiniteness of permissive exemptions (even if the 2(b) proviso were such) can raise no question of constitutionality.

5. Petitioner objects to the *terms* of paragraph 6 of the order as modified by the court below without denying the violation at which that paragraph is aimed. It is undisputed that the differential to Citrin-Kolb was used by Citrin-Kolb to give certain of its customers a competitive advantage over retailers buying direct from petitioner. This practice, if permitted, would allow petitioner to discriminate indirectly between retailers of its gasoline, while prohibited from doing so directly. A supplier who sells at different prices to different customers in the same sales area takes the risk of violating the Act. If a wholesaler buying at a differential opens up his own retail store and becomes in part a retailer, the supplier cannot prevent it but is chargeable with the consequences. Similarly, if the wholesaler achieves the same result by passing on part of his differential to his customers; the supplier is responsible for the resulting competitive injury to his own customers and it is no defense to say that he cannot control the price at which the wholesaler resells. Without paragraph 6 the decree would be ineffective.

The decree protects wholesalers by protecting their retailer customers to the same extent that it protects the retailer customers of petitioner. The only jobbers affected are those who demand the privilege of using their wholesale differential to create a competitive advantage for themselves or their customers at the retail level.

ARGUMENT.

POINT I.

The legislative history of the Robinson-Patman Act shows that Congress intended to eliminate "meeting competition" as an affirmative defense or justification for price discrimination prohibited by Section 2(a). Petitioner's interpretation of the proviso of 2(b) would defeat the principal objective of the Act, which was to protect competition between individual purchasers from the same seller.

Section 2(a) of the Clayton Act is a complete section declaring certain price discriminations unlawful without reference to any other section; it contains provisos creating some, and therefore presumably all, affirmative defenses. The complaint herein charged, the Commission found, and the order recited a violation of *that section*. That the proof established a violation of Section 2(a) is not in dispute except as to interstate commerce. Petitioner asserts, however, that Section 2(a) is not a complete section but is modified by the proviso of Section 2(b); and that even though none of the affirmative defenses permitted under 2(a) is established, a discrimination prohibited by that section is not unlawful if the seller's lower price was made in good faith to meet an equally low price offered by one of his competitors.

An intention on the part of Congress to modify the substantive provisions of a section complete on its face by a *proviso* of another section can hardly be inferred in the absence of express language to that effect. The function of a proviso is to modify what goes immediately before, and the first part of Section 2(b) deals only with matters

of evidence and burden of proof. Nothing in the first part of that section adds to or detracts from the offense defined or the defenses made available in Section 2(a).

The proviso of Section 2(b) does not in terms permit *discrimination in price* where the seller's lower price is made in good faith to meet the price of a competitor; it only permits such meeting of competition to be shown in *rebuttal of the Commission's prima facie case* of violation of Section 2(a). Presumptively, therefore, the rebuttal permitted is rebuttal within the scope of the issues of 2(a), effective to the extent that it overcomes or controverts the Commission's evidence or inferences drawn therefrom. That this was the intention of Congress is made so clear by the legislative history of the Act as to leave no room for doubt.

The Robinson-Patman Act grew out of the Federal Trade Commission's chain store investigation, completed in 1934.* Its report showed that many large chains were receiving discounts, allowances and other advantages greatly in excess of those granted, not only to competing retailers, but even to wholesalers. Section 2 of the Clayton Act had been found insufficient to cope with these practices. With regard to the provisos of that section, the House Judiciary Committee stated in reporting the Patman bill in 1936:

> "These provisos have so materially weakened section 2 of that Act, which this bill proposes to amend, as to render it inadequate, if not almost a nullity." (H.R. Rep. 2287, 74th Cong. 2d Sess., p. 7.)

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* *Final Report on the Chain Store Investigation*, Sen. Doc. No. 4, 74th Cong., 1st Sess. See also: *Hearings before Special Committee on Investigation of American Retail Federation*, 74th Cong., 1st Sess. (1935), and *Investigation of Trade Practices of Big Scale Retail and Wholesale Buying and Selling Organizations*, 74th Cong., 1st and 2d Sess. (1935-1936).

In reporting the Robinson and Patman bills favorably both the Senate and House Committees emphasized the purpose to protect the competitive opportunity of the small businessman by prohibiting all price differentials except those which could be justified in full by cost savings. The purposes of the final bill were summarized in the report of the House Conferees as follows:

> "The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them." (H.R. Rep. 2951, 74th Cong. 2d Sess.)

The primary remedial objective of the Robinson-Patman Act, therefore, was the protection of the smaller independent merchants from injury to their competitive position resulting from discriminatory advantages extended by manufacturers and producers to mass distributors who were using their concentrated buying power to demand and obtain price concessions and preferential allowances and services. As stated by this Court in *Federal Trade Comm.* v. *Morton Salt Co.*, 334 U. S. 37, 43:

> "The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price."

We do not believe that by the above language this Court meant that the Act permits a seller to give an unearned

price advantage to a large buyer whenever he can show, as he usually can, that another seller is willing to sell at the same price or discount to obtain that buyer's business. To so hold would mean that the seller's interest in meeting his own competition is to be the sole test of his right to discriminate in price between competing customers, which would defeat the very legislative purpose which the Court recognizes.

The "meeting competition" proviso was considered one of the principal loopholes in old Section 2, and Congress deliberately discarded it. Both the original Robinson bill and the original Patman bill omitted any provision similar to the old "meeting competition" proviso. In the Senate the old proviso was inserted in the Robinson bill by amendment. In the House the Judiciary Committee reported the Patman bill with a section substantially identical with present Section 2(b). The Conference Committee rejected the Senate version and approved the House amendment in the form enacted. The report of the House conferees, referring to the Senate proviso, stated:

> "This language is found in existing law, and in the opinion of the conferees is one of the obstacles to enforcement of the present Clayton Act. The Senate receded, and the language is stricken. A provision relating to the question of meeting competition, *intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission*, is included in subsection (b) * * * *" (H.R. Rep. 2951, 74th Cong. 2d Sess.; italics supplied).

In presenting the Conference Report in the House, the Chairman of the Conferees explained the 2(b) proviso as follows:

> "It is to be noted, however, that *this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely*

permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities and duties. They are fixed in the other provisions of the bill. It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given, as one lying within the limitations laid down by the bill, and whether the way in which the competition was met lies within the latitude allowed by those limitations.

"This procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill.

* * * "*If this proviso were construed to permit the showing of a competing offer as an absolute bar to liability for discrimination, then it would nullify the act entirely at the very inception of its enforcement; for in nearly every case mass buyers receive similar discriminations from competing sellers of the same product.*" (80 Cong. Rec. 9418; italics supplied.)

In the Senate, Senator Logan stated:

"The purpose of the bill is to stop up loopholes found in section 2 of the Clayton Act. Section 2 of the Clayton Act has been abated. There was a provision in it, as Senators will remember, allowing the granting of price differentials to meet competition in a particular community. That was perhaps unwise, although at the time of the passage of the Clayton Act it was well designed to remedy the evils then in existence. However, since then time has proved that there are ways to evade the Clayton Act, and therefore it is necessary to strengthen its provisions; and the bill seeks to do nothing else." (80 Cong. Rec. 3119.)

Petitioner's price discrimination in favor of its four jobber-retailers in Detroit is typical of the discriminations which Congress sought to reach and prevent in passing the Robinson-Patman Act. This is particularly true as to Ned's Auto Supply Company. Ned's was a large retailer operating a chain of four super-service stations located at strategic points in the City of Detroit. These stations competed with most of the other Standard stations in the Detroit metropolitan area. Stated most favorably to petitioner, the case is that Ned's, buying over 2,000,000 gallons of gasoline a year, procured bulk storage facilities and prevailed upon other suppliers to offer to sell to it in tank car quantities at tank car prices. Ned's then went to petitioner and demanded that petitioner classify it as a jobber and sell to it at petitioner's jobber price, and petitioner did so because of the threat of losing Ned's business.

Petitioner's contention is that if it encounters competition in selling to one customer, and meets that competition in good faith, it may then sell at any price it chooses to other competing customers. If that is what the Act means, then it has wholly failed to accomplish its purpose. There would be nothing to prevent a large grocery, drug or tobacco chain from establishing warehouses for the reception of goods in large quantities for distribution to its own stores (as many of them do), and demanding of its suppliers that it be classified as a wholesaler and granted the wholesaler price, or even a lower price. Such a chain would have no difficulty in finding a number of suppliers, as to many lines of goods, willing to accede to its demands. Yet that situation is precisely the one portrayed by the Commission's report of its Chain Store Investigation in 1934 and which led to the enactment of the Robinson-Patman Act.

Stripped of its non-essentials, this case boils down to the simple matter of four retailers who were given a quantity price differential which was not available to their competitors and which was not justified by differences in seller's costs. Qualification for the differential was on the basis of annual purchases and it was denied other retailers who were able to buy and take delivery in carload quantities. The three wholesalers were accorded the differential without regard to the amounts they resold at retail. This is in substance the *Morton Salt* case (334 U. S. 37), where Morton granted unjustified quantity discounts to certain large retail chains and others purchasing specified quantities in carload lots during a 12-months period. The Court pointed out (p. 42) that these discounts "were enjoyed by certain wholesalers and retailers who competed with other wholesalers and retailers to whom these discounts were refused", and that this was directly contrary to the policy of the Act. Surely the decision in that case would not have been different had Morton shown that it was industry practice to grant these discounts to large volume buyers, or that some of its competitors were offering them the same discounts.

Petitioner concedes, and in fact argues in its defense, that it merely followed an *industry practice* in classifying large retailers as jobbers and selling to them at the jobber price. Petitioner asserts that the four dealers to whom it sold as jobbers "all belonged to a distinct class of buyers; so recognized throughout the industry"; and admits that it sold to both "classes" at "the going price" (brief, pp. 42, 43). Furthermore, petitioner's Detroit manager testified that petitioner has certain "requirements" which a retailer in Detroit must meet to qualify for classification as a jobber (R. 119), and petitioner refers to these at page 4 of its brief as following industry practice. While these requirements (principally purchasing in large volume and

tank storage) were made so high (as to volume) that only Ned's and the wholesalers could meet them, the implication is that the tank car price was available to any retailer who could qualify, regardless of any specific competing offers.

According to petitioner, the major oil companies competing in a given territory have two prices, a tank wagon price and a tank car price, customers being classified according to volume, *and each company meets its competitors' higher price as well as its lower price to each class of customers.* At least, petitioner admits that that is its practice. This does not differ except in degree from the situation which confronted this Court in the *Staley* and *Cement Institute* cases, where the sellers' basing point prices differed between competing customers at different delivery points and where, as here, the differentials were not justified by difference in costs. In those cases, as here, the sellers met their competitors' higher prices, as well as their lower prices, at each point. As we read the opinion in the *Staley* case (324 U. S. 746, 752-755) this Court held, before reaching the question of "good faith", that even if Staley's lower prices involving freight absorption were made in good faith to meet competitors' prices, that did not justify its higher prices to other customers involving phantom freight.

Likewise here, to the extent that the difference between the "going price" to the tank car buyers and the "going price" to the tank wagon buyers exceeds the difference in cost of serving them, the latter are forced to subsidize their own competitors. And petitioner's practice of selling to certain large retailers at its jobber price while denying that price to others "constantly results in his getting more money for like goods from some customers than he does from others", which this Court has said Section 2(b) does not permit (*Cement Institute* case, 333 U. S. 683, 725).

This Court's opinion in the *Staley* case, if we understand it correctly, has already disposed of petitioner's contention that meeting a competitor's price in good faith is an absolute defense in every Section 2(a) case. The Court there considered the change made by the Robinson-Patman Act in the language of the "meeting competition" proviso and its transfer to procedural section 2(b), and stated (324 U. S. at p. 752):

> "The change in the language of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."

Since the question whether competition was met in good faith was a "matter of evidence" under the old proviso, we understand the above language to mean that *if the "defense" is proved* it *then* raises a question of fact in the particular case as to whether the competition justified the discrimination.

Of course, in order to determine whether the competition justified the discrimination the Commission must consider the nature and effect of the discrimination as well as the competition met by the seller. We have no doubt that by "the competition" this Court referred to all the competition affected by the discrimination. The question in every case is whether, upon all the facts including meeting competition, the net effect of the discrimination may be that prohibited by the Act.

The Commission's position in this case is, that even assuming petitioner's price to its four jobbers in Detroit was made in good faith to meet the equally low price of certain of its competitors, that fact cannot justify a discrimination in price affirmatively shown to have resulted in

serious competitive injury to hundreds of retail dealers engaged in direct competition with the four jobbers. The injury to competition between petitioner's tank car customers and tank wagon customers did not depend on whether petitioner's tank car price was made in good faith to meet competition; it was the result of the amount of the differential and the competitive situation existing in the retail sale of gasoline in Detroit. The Commission found that upon this record, substantial injury to competition having been affirmatively shown, it is not material whether the lower prices granted by petitioner to the four jobbers were made to meet equally low prices of petitioner's competitors, and that it was therefore unnecessary for the Commission to determine whether petitioner's tank car prices were in fact made in good faith to meet such competition (R. 5179, 5182).

Paragraph Thirteen of the Commission's findings (R. 5182) is as follows:

> "Paragraph Thirteen: Since the record in this case affirmatively shows that the discriminations in price in favor of the named jobbers and in favor of Ned's Auto Supply Company as a tank-wagon purchaser from September 1, 1936, to March 7, 1938, and as a tank-car purchaser thereafter, have resulted in injuring, destroying, and preventing competition between said favored dealers and retail dealers in respondent's gasoline and other major brands of gasoline, the Commission is of the opinion, and so finds, that the defense of meeting an equally low price of a competitor as provided by subsection (b) of Section 2 of the Clayton Act is not available to the respondent on the basis of the present record."

It is submitted that this finding is conclusive unless, as contended by petitioner, meeting competition in good faith is an absolute defense to a charge of violation of Section

2(a) in every case as a matter of law. Certainly this record provides ample factual ground for the finding. It would be difficult to conceive a case of price discrimination more clearly "in violation of the obvious intent" of the Robinson-Patman Act.

POINT II.

Acceptance of petitioner's construction would mean that the Robinson-Patman Act weakened the Clayton Act. Petitioner has not justified its *difference* in prices on the ground of meeting competition, which even old Section 2 required.

Section 2 of the original Clayton Act permitted a seller to justify a *discrimination in price*, otherwise unlawful, by showing that it was made in good faith to meet competition. That section contained the following proviso:

> "That nothing herein contained shall prevent * * * discrimination in price in the same or different communities made in good faith to meet competition."

Under that proviso, in order to justify a discrimination in price, the seller had to justify his higher price as well as his lower price. He had to show that the *difference* in his prices was made in good faith to meet competition. Presumably this meant that he had to show that it was necessary for him to charge a higher price to some customers than to others because of the competition he met.

A seller might have justified a discrimination in price between competing customers, under the old proviso, by showing that his competitor's price to certain customers was so low that he could not meet it by lowering his price to all his customers and make a necessary or reasonable profit. If the discrimination was not between competing

customers (as where a seller lowers his price to all customers in a certain area to meet local competition), he might have shown that his local price was made in good faith to meet and not to beat his local competitor, and that the higher price charged elsewhere did not result in injury. Some such proof was necessary to justify the *difference* in prices which constituted the discrimination.

Petitioner now contends that under the Robinson-Patman amendment it is no longer necessary for a seller charged with injurious price discrimination to show that the *discrimination* was made in good faith to meet competition. Petitioner claims that under the present proviso a seller need only justify his *lower* price on that ground, and that if he can do so he has a complete defense.

Petitioner does not assert, and the record does not show, that its price to the four jobbers was so low as to justify a higher price to its other retailer customers. It does not claim that it was necessary for it to make a higher margin of profit in selling to tank wagon customers than to tank car customers. On the contrary, it sold to the jobbers at its regular tank car price and to its tank wagon buyers at the "going" tank wagon price, at a differential not justified by cost differences. It relies only on evidence that the large buyers demanded the price they got, and that other suppliers were willing to give it. Such evidence does not show that discrimination against other retailers was necessary to meet competition, and would have been insufficient as a defense even under the old proviso.

It is not intended to suggest that if the price to the jobbers had been still lower the discrimination might have been justified. The point is that in an Act passed for the avowed purpose of *strengthening* the Clayton Act, Congress could not have intended to let down the bars to injurious price

discrimination whenever the seller can show that another supplier is offering the same price to the favored customer. A seller in a competitive industry usually encounters competition in selling to large purchasers, and petitioner's construction of the meeting competition proviso would license oppressive discrimination.

Section 2(a) is aimed at injury to competition resulting from a *difference* in the prices charged different purchasers, and is not concerned with the prices charged any single customer or class of customers. If Congress had intended to retain "meeting competition" as a defense, it would at least have required proof logically justifying the seller's *discrimination* in price on that ground.

Actually, as the legislative history shows, Congress in framing the Robinson-Patman Act deliberately eliminated even the old defense of meeting competition. Selling to one customer at a price so low as to necessitate charging higher and discriminatory prices to others is economically unsound, even when necessary to meet competition, except possibly as a temporary expedient until recourse can be had by the seller to the courts in a case where the competitor is violating the law.

If a seller loses a customer to a competitor as a result of a discriminatory price offered by the competitor, the Clayton Act gives him a right of action for three times his damages, and he may also seek an injunction in the District Court. To permit retaliation in such a case would be to let one violation of law justify another. In the *Staley* case (324 U. S. at p. 754) this Court cited the statement of the Chairman of the House Conferees, in presenting the Conference Report on the Robinson-Patman bill, that

> "this procedural provision cannot be construed as a carte blanche exemption to violate the bill so long as

> a competitor can be shown to have violated it first, nor so long as that competition cannot be met without the use of oppressive discriminations in violation of the obvious intent of the bill."

And Senator Logan, in explaining the Robinson bill in the Senate pointed out that one of the weaknesses of old Section 2 was "in that it permits discriminations to meet competition and thereby tends to substitute the remedy of retaliation for that of law which results in destructive consequences to the main purposes of the bill." (80 Cong. Rec. 3113.)

On the other hand, if the competitor who offers a lower price to the seller's customer is not discriminating in price, then the situation is one of normal price competition between sellers, and the remedy is to meet that competition without engaging in unlawful discrimination. If the seller cannot meet such competitor's price in fair competition it is because the competitor either is more efficient or has some lawful advantage such as lower transportation costs due to proximity to the customers solicited. In either case normal competitive forces come into play and the business will and should go to the seller able to offer the lowest non-discriminatory price.

Petitioner construes the proviso of Section 2(b) as if it read:

> "*That noiking herein contained shall prevent discrimination in price* where the seller's lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, * * *."

The italicized language was contained in the old proviso. If Congress had intended to retain "meeting competition" as a substantive defense, merely changing the specifications as to the competition to be met, it undoubtedly would have retained that language. Instead, the words "discrimination

in price" were dropped, and the words "a seller rebutting the prima facie case thus made by showing" were substituted. The striking out of the former words, and the placing of the proviso in a separate procedural section "intended to operate only as a rule of evidence," indicates plainly that the legislative intent was not to weaken the requirements of, but to eliminate, the former substantive defense.

Petitioner asserts at pages 42-43 of its brief that if the decree below is affirmed it will simply result in the four jobbers being taken over by other suppliers at the same or lower prices and will not benefit petitioner's retailer customers against whom it is now discriminating. This is only to say that petitioner should not be compelled to comply with the Act because in its opinion the Act fails in its purpose. Nevertheless, the fallacy of this argument exposes the fundamental weakness of petitioner's position in this case.

The argument made is that these jobbers would be taken over as customers by some Michigan refiner, or some other supplier selling only to jobbers in Detroit who would not be violating the Robinson-Patman Act. In the first place, the Michigan gasoline is "off-brand" or non-major gasoline, which petitioner concedes sells at a price of 2 cents or more a gallon below the major price (brief, p. 4), obviously has little public acceptance, and is a minor competitive factor. All non-major gasoline sold in Detroit amounts to less than 13 percent of the total (R. 328).

Furthermore, it is significant that the record shows no instance of a major oil company distributing gasoline to retailers in the Detroit area, or in any metropolitan area, only in tank car quantities, although petitioner's two nearest competitors in sales volume in Detroit (Sun and Socony-Vacuum) do not sell to jobbers and limit their distribution to retailers buying at the tank wagon price (R. 333, 2130).

Petitioner's own Assistant Sales Manager, Marshall, stated that while these jobbers could obtain "as favorable or possibly a more favorable price than they are enjoying today," "they would be limited * * * to buying products not generally distributed in this area, having no public acceptance, and possibly of not as acceptable quality" (R. 1092-3). It appears, therefore, that if petitioner is prevented from selling to these jobbers in their retailing capacity at an unjustified differential, its prediction of their ability to obtain another equally competitive brand of gasoline at as low a price without violating the Robinson-Patman Act will turn out to be nebulous.

But let us suppose that another major oil company, not now marketing in Detroit, should enter that field and sell its branded gasoline to these and other retailers in tank car quantities, at 1½ cents or more below the major tank wagon price. That would mean that a major competitor would be selling gasoline to retailers at a lower price than petitioner and other major companies. Presumably the new competitor, having no retail outlets of its own, would sell to all who would buy in tank carloads, a privilege now denied to many of petitioner's customers who are able to or could arrange to take tank car delivery. This would be price competition between major oil companies, a healthy condition but one which this record and common knowledge indicates is practically non-existent. Petitioner and other major companies would have to reduce their tank wagon price to meet the new competition or lose both customers and gallonage. Undoubtedly the competition would be met, and the public would benefit.

Such competition would be quite different from the present situation where a strictly limited number of retailers are given a price advantage over the tank wagon stations of the same supplier. Business diverted from the latter

to Ned's is gallonage lost by petitioner to itself—a situation which petitioner can and does control to the extent necessary for its own protection, as shown by the statement of facts herein. The tank wagon retailers, who furnish the bulk of petitioner's business, are forced to compete at a disadvantage with Ned's stations *selling the same brand*, a situation which would not exist if Ned's bought elsewhere. These dealers may expect protection from their supplier against competition from another source, but are helpless when the supplier himself discriminates against them.

The record shows, and it is common knowledge, that the tank wagon prices of the major oil companies are generally the same (R. 126, 129). The only instance of major company price competition which petitioner's Detroit manager could cite in Detroit was the instance in the fall of 1939 when price cutting initiated by Ned's and two or three other "subsidized" jobbers got out of hand and Sun Oil Company reduced its price to its retailers to enable them to meet competition (R. 127-8). This "price war" lasted only a few weeks, after which the major tank wagon price went back to its exact former level and, significantly, Ned's advertised price cutting was stopped although Ned's still had its price advantage (See table, p. 16, *supra*).

Unfortunately, the prospect of the decree herein producing bona fide price competition between the major oil companies is remote; but if that result were achieved it would be greatly to the benefit of retail gasoline dealers and of the public. The purpose of the decree is, and its effect will be, to stop the prevailing practice of the major oil companies of giving an unearned competitive advantage to a few strategically located retailers, thereby artifically stimulating unfair price competition between their own customers, for the purpose of keeping the dealer's margin at a ruinous level without reducing the price at which he buys.

POINT III.

Section 2(b) is a purely procedural section governing only Federal Trade Commission proceedings. It makes proof of meeting competition effective as rebuttal in a Commission proceeding to the same extent as in court actions, to which Section 2(b) does not apply. Such proof will be effective in some cases and not in others.

It is submitted that the following reasoning demonstrates that meeting competition is not a defense either in a Commission proceeding or in a court action for enforcement of the provisions of Section 2 of the Clayton Act, and points out the correct construction of the meeting competition proviso:

(1) Section 2(b), by its express language and by its legislative history, is applicable only in Federal Trade Commission proceedings.

(2) Since that section is not governing in injunction and triple damage suits in the District Courts, meeting competition cannot be a defense to such actions.

(3) It could hardly have been the intention of Congress to prescribe different rules of proof and different defenses in Commission proceedings than in court actions under the same Act.

(4) It follows that Section 2(b) should be regarded as a procedural section merely declaratory of established rules of evidence and burden of proof as applied by the courts, enacted for the purpose of assuring their application in Commission proceedings.

Section 2(b) was referred to in the House Judiciary Committee report on the Patman bill as an "added pre-

cautionary provision," and in the Conference Report to the House as a section "relating to certain questions of procedure before the Federal Trade Commission" (H.R. Reports Nos. 2287 and 2951, 74th Cong. 2d Sess.). In presenting the Conference bill in the House, the Conference Manager stated with regard to this section:

> "Owing to a body of court decisions to the effect that the legal rules of evidence do not in certain respects apply to hearings before administrative commissions, and to the uncertainty thus suggested, the bill contains a subsection stating the rule as to burden of proof * * * as applicable to hearings before the Federal Trade Commission." (80 Cong. Rec. 9418.)

The above explanation points out the complete answer and solution to the much debated question as to the meaning of Section 2(b). Most of the commentators seem to have overlooked or ignored it. The simple fact is that Section 2(b) was inserted in the Act solely for the purpose of assuring the application of court rules of proof in Commission proceedings. Its provisions are wholly procedural, and are merely declaratory of established rules of evidence and burden of proof. Whether the addition of the section as a "precautionary provision" was necessary is immaterial; the fact is that it was added for that purpose and has no substantive effect.

The language of Section 2(b) expressly limits its application to Commission proceedings. It applies to "hearings on a complaint", and provides that if a prohibited discrimination is prima facie established, and is not affirmatively justified, "*the Commission* is authorized to issue an order *terminating the discrimination.*" The section is thus limited to Commission "hearings" and cease and desist orders.

There is no basis in the language of the section or in its history for giving the proviso a broader application than the first half of the section. The function of a proviso is to limit or modify what goes immediately before; and the proviso relates to "the prima facie case" mentioned in the first part of the section. The entire section obviously was intended to govern only Commission proceedings and not court actions.

It follows that Section 2(b) is not a part of the statute as applied to triple damage and injunction units brought in the District Courts pursuant to Sections 4, 15 and 16 of the Act. The authority of the Attorney General to enforce the provisions of Section 2 by injunction suits in the District Courts is co-extensive with the enforcement authority of the Federal Trade Commission. It is scarcely conceivable that Congress could have intended to provide a substantive defense to a respondent in a Commission proceeding that would not be available if he were sued by the United States, or by an injured party, in a District Court. If that result was not intended, then the meeting competition proviso, like the rest of Section 2(b) must be deemed wholly procedural, inserted in the Act to assure conformity of rules of proof in Commission proceedings and court actions.

The obvious conclusion is that *proof that a seller's lower price was made in good faith to meet the equally low price of a competitor has exactly the same effect as rebuttal evidence in a commission proceeding that it has in a court action.* Where it succeeds in rebutting or overcoming the Commission's or the plaintiff's affirmative case it may establish a defense; where it is not responsive it does not succeed as rebuttal and not a defense.

Proof that the seller's lower price was made in good faith to meet a competitor's price will be effective as rebuttal in some cases and not in others. The legislative

history indicates that in inserting this proviso in Section 2(b) Congress had in mind the type of case where proof that the seller's lower price was made in good faith to meet his competitor's equally low price effectively rebuts a prima facie case of unlawful discrimination, *as a matter of evidence*. Such is the case where there is no discrimination between competing purchasers and the only competition alleged to be injured is competition between the seller and his own competitor. *Muller* v. *Federal Trade Comm.*, 142 F. 2d 511 (6th Circ. 1944) and *Moss* v. *Federal Trade Comm.*, 148 F. 2d 378 (2d Circ. 1945) are cases of that type. The dictum of the court in the *Moss* case as to the effect of the 2(b) proviso must be read in the light of the fact that only seller competition was involved. In such cases proof that the competitor's price was met in good faith effectively rebuts an inference of injury to competition drawn from the mere fact that the seller's price where he met competition was lower than the price charged elsewhere to non-competing customers.

On the other hand, where injury to competition between the seller's customers is charged, the fact that his lower price was made to meet his own competitor's price to one customer is not inconsistent with resulting injury to competition between that customer and other customers paying a substantially higher price, and does not overcome the inference of such resulting injury. In such a case the rebuttal is not responsive and fails.

Petitioner's argument proceeds on the assumption that Congress has provided that proof that a seller met his competitor's price in good faith shall be treated as *sufficient in every case* to rebut an inference that discrimination in price may result in injury to competition, even where it does not logically overcome such an inference or controvert the evidence on which it is based. The language of the proviso does not require such a forced construction.

The assumption that because the proviso refers to rebuttal of a prima facie case it affords a complete defense in every case overlooks the distinction between rebuttal by affirmative justification (confession and avoidance) covered by the first part of 2(b), and rebuttal in the true sense of proof which is responsive to and overcomes the effect of evidence introduced by the other side. The function of the proviso is to qualify the first part of the section by making clear that rebuttal of a prima facie case is not limited to a showing of affirmative justification and that proof of meeting competition is still available to a seller in a Commission proceeding *as evidence* to refute or contradict the Commission's proof or inferences based thereon.

It is true that the thing which "nothing herein contained shall prevent", in each of the provisos of Section 2(a) as well as the proviso of 2(b), is lawful. Of course, it is lawful for a seller to rebut a prima facie case of unlawful price discrimination, *if he can*, by showing that his lower price was made to meet the price of a competitor. That does not mean that such proof will *succeed* as rebuttal in a case where it is not responsive to the Commission's (or plaintiff's) evidence that the discrimination is one which may result in substantial injury to competition. That was in substance the reasoning followed by the court below, and was the basis for the Commission's conclusion that it was unnecessary for it to determine whether petitioner's price to the jobbers in this case was in fact made in good faith to meet the offers of its competitors.

In originally deciding this case the Commission seems to have considered that proof that the seller's lower price was made in good faith to meet competition is sufficient to rebut what it refers to as prima facie evidence of injury to competition, even where the injury proved or inferred is injury to competition between competing customers

(findings, paragraph 12, R. 5180). The Commission drew a distinction between prima facie evidence and "affirmative proof"; but decided that since in this case injury to competition between the four jobber-retailers and their competitors was affirmatively shown, petitioner's evidence that it met its own competitor's prices in selling to the jobbers was not responsive and did not rebut the Commission's case.

We do not concur with the Commission's dictum that if it had proved something less than actual resulting injury to competition, petitioner's good faith as to its lower price, if established, might have succeeded as rebuttal. As this Court stated in the *Morton Salt* case (334 U. S. at p. 50):

> "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to competitors of those customers."

Proof of a substantial discrimination in price between competing customers clearly is sufficient, in any case where competition between such customers is alleged to be injured, to support an inference that the effect of the discrimination "may be" to injure competition; and in the absence of any evidence rebutting that inference additional proof should be unnecessary. Proof that the seller's *lower* price was made in good faith to meet his own competitor's price to one customer is entirely consistent with, and does not rebut, an inference that competitive injury may result from his substantial *discrimination* in price between competing customers.

The court below also was of the opinion that the Commission must do more than prove two prices (which is in accord with this Court's opinion in the *Morton Salt* case, *supra*), but went on to point out that the Commission had proved more than was necessary and that 'It is not actual injury alone, but the prospect reasonably to be expected of injury to competition which the statute seeks to prevent.' There can be no doubt that the Commission could and should have reached the same result in this case even if substantial loss of business by petitioner's retailer customers to the favored "jobbers" and their customers had not been proved.

POINT IV.

This case presents no substantial constitutional question.

The constitutional question attempted to be raised by petitioner is so lacking in substance as to deserve little if any discussion.

The order and decree in this case do not deny to petitioner the right to meet a competitor's price in selling to any customer, for the purpose of meeting competition or for any other reason. Neither does Section 2(a) or Section 2(b) of the Clayton Act, as construed by the Commission and by the Court of Appeals herein, deny that right to petitioner.

The question here presented is not whether a seller may meet competition. The question is whether the fact that he encounters competition in selling to one customer, and meets his competitor's price to that customer, is made by the statute a justification for charging a higher and discriminatory price to other competing customers without regard to the effect of the discrimination.

Section 2(a) is directed at *discrimination* in price in the course of interstate commerce which may result in injury to competition or a tendency toward monopoly. That section is not concerned with a seller's higher or lower price as such (if he has two prices) but only with the difference between them and its effect. A seller has no constitutional right to discriminate in price between two competing customers whenever a competitor offers a lower price to one of them, even though he may consider it in his interest to injure one rather than lower his price to both.

The provisos of Section 2(a), in so far as they furnish exemptions from the affirmative prohibitions of the section, are permissive defenses to be taken advantage of by the person claiming them. The same would be true of the proviso of Section 2(b) if, as petitioner contends, it also provided an exemption from the prohibitions of 2(a). Both sections would be equally valid if all of the provisos were omitted. Therefore, whether the 2(b) proviso be wholly procedural or wholly substantive or partially both, the claim of uncertainty and indefiniteness raises no constitutional question. The offering of an illusory exemption cannot invalidate a prohibitory statute which would be valid if it offered no exemption at all.

POINT V.

Petitioner's objections to Paragraph 6 of the Commission's order are without merit. The prohibitions of that paragraph are essential to the effectiveness of the order.

Petitioner sells its branded gasoline at tank car prices to three wholesalers in the Detroit metropolitan area each of whom resells to from fifteen to sixty retail gasoline service stations in that area. The price at which these whole-

salers resell is normally the posted tank wagon price of their supplier. They make deliveries by tank truck to their customers' service station tanks in the same manner that deliveries are made by petitioner to its retailer customers.

Petitioner also sells its branded gasolines at its posted tank wagon price to from 350 to 400 retail service station operators in the Detroit area. These tank wagon customers are engaged in competition with the tank wagon customers of the wholesalers. The tank car differential to the wholesalers on Red Crown gasoline (petitioner's largest selling brand) is 1½ cents a gallon; on Solite with Ethyl 1¾ cents.

This record shows without dispute that a differential of 1½ cents a gallon is sufficient to enable wholesalers buying in tank car quantities to resell at a profit to their retailer customers, or to some of them, at prices lower than petitioner's tank wagon price. The best, but not the only, evidence of this is the fact that the largest of the wholesalers, Citrin-Kolb Oil Company, actually has done so. Citrin-Kolb from 1936 to 1941 sold a million gallons of petitioner's gasoline a year to the operator of a chain of five retail service stations in Detroit, delivered at the stations, at a cent a gallon below petitioner's tank wagon price. Max Biber, general manager of Citrin-Kolb Oil Company, testified that "the only expense involved is the hauling and we can make money at hauling gasoline for a half a cent a gallon" (R. 1878-9). Citrin-Kolb Oil Company also gave a rebate of ½ cent a gallon off the posted tank wagon price to at least one other service station in Detroit during the period covered by the testimony in this case (Comm. Ex. 33, R. 4733).

We have shown in the statement of facts in this brief that petitioner's tank wagon customers are not at liberty to buy petitioner's branded gasolines from wholesalers even if a wholesaler should offer them a price below petitioner's tank wagon price. *All of these 350 to 400 dealers are precluded*

either by means of short term leases or by contracts from purchasing from wholesalers, and petitioner does not permit them to purchase in tank car quantities at tank car prices.

In this situation, if a wholesaler passes along a part of his wholesale margin to certain of his retailer customers, selling to them below the price paid by petitioner's direct retailer customers, the resulting competitive injury is the same as if the favored customers of the wholesaler purchased directly from petitioner at the discriminatory price.

Section 2(a) of the Clayton Act prohibits discriminations in price in interstate commerce between purchasers of goods of like grade and quality, sold for resale, where the effect of the discrimination may be "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*". The Commission has found that the effect of the petitioner's discriminations in price to its three Detroit wholesalers has been, and may be, to injure, destroy and prevent competition with the respective customers of said wholesalers in the resale of gasoline. Upon the state of facts above outlined, this finding cannot be challenged, and petitioner does not challenge it. Neither does petitioner deny that under these circumstances its discrimination in price between wholesalers and retailers in the same sales area violates Section 2(a). Its complaint against paragraph 6 of the Commission's order goes only to the terms of that paragraph and is at most a plea for modification.

Petitioner objects to paragraph 6, as modified by the court below, on the ground that it would compel petitioner to require its wholesaler customers to maintain their resale prices at not less than petitioner's posted tank wagon price.

This contention is nothing more than a smoke screen. Paragraph 6 does not require petitioner to do anything except stop discriminating in price in favor of wholesalers and against retailers under conditions, shown to have existed, in which the Commission has found such discrimination to result in injury to competition and to be unlawful.

When a seller discriminates in price between different purchasers of the same goods he must, if he would avoid violation of the Clayton Act, assume the burden of ascertaining and keeping himself informed that the conditions under which he sells do not make his price discriminations unlawful. Lack of knowledge that such conditions exist is no defense. Neither is it a defense that the conditions are beyond his control.

Specifically, if petitioner chooses to sell at a substantial difference in price to wholesalers and to retailers in the same territory, it knows and takes the risk that the wholesalers may open retail stores and use their price advantage in selling direct to the public in competition with petitioner's retailer customers, or may pass on a part of their price margin to their customers who compete with petitioner's retailer customers. If it is true that petitioner has no control over the resale prices of its wholesalers, neither can it prevent them from selling at retail. Yet if a wholesaler engages in either of the above practices and petitioner continues to sell to him at the wholesale differential, the differential becomes an unlawful discrimination because under those conditions it may result in injury to competition with the wholesaler in his retailing capacity, or with his customers. In order to avoid violation of the Act petitioner must either assume the burden of keeping itself informed that its wholesalers do not engage in either of those practices or it must abandon the discrimination. This order requires no more.